

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2726 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

RAMANBHAI LALLUBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR BB NAIK for Petitioner

MS MANISHA LAVKUMAR, AGP, for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 04/08/2000

ORAL JUDGEMENT

1. The petitioner, an Headmaster in the Education Department of the Government of Gujarat, filed this petition questioning the action of the respondents to supersede him in promotion in the category of Assistant Headmaster, and as a result of which, his promotion to

the next higher post of Headmaster, Class-II services.

2. The facts of the case are that the petitioner was appointed as Assistant Teacher on which post he joined on 18th July, 1977 at Kanya Vidyalaya, Dhoraji, a Government Secondary School. He served at that school from 18th July, 1977 to 30th September, 1978. He was transferred from Dhoraji to Uttar Buniyadi Ashram Shala, District Dang. He served there from 5th October, 1978 to 30th June, 1979. From there, he was transferred to Government Secondary School at Pimpri, District Dang and there he served from 4th July, 1979 to 18th September, 1981. From there he was transferred as Assistant Teacher to Government Multipurpose High School, Abrama, District Valsad and there he served from 19th September, 1981 to 8th April, 1985 and from 10th April, 1985, the petitioner is serving as Headmaster at Uttar Buniyadi Ashram Shala, Singhania, District Dang. The petitioner made a categorical statement in para-1 of the special civil application that he has not received any adverse remarks in his confidential report except before he joined at Singhania on 10th April, 1985 and that is also on 12th December, 1986 and 16th December, 1986 for the years 1984-85 and 1985-86. He has stated that the remarks which have been communicated to the petitioner for his services during the year 1984-85 and 1985-86 are also baseless and false.

3. The petitioner has come up with the case that Shri A.P. Patel joined the services of the Government as Assistant Teacher with the petitioner in the same school at Dhoraji on the same day but the petitioner being older and is senior to him and he is shown senior to Shri Patel in the seniority list of Assistant Teachers. This fact is not disputed by the respondents in reply to the special civil application filed by them. Shri A.P. Patel was promoted in the pay scale of Rs.550-900 on the post of Assistant Headmaster vide order dated 6th July, 1984 of the respondent No.2. The petitioner being senior to Shri Patel has not been given promotion and rightly he felt offended of that promotion of Shri Patel and filed representations dated 22-8-1984, 3-9-1984, 4-2-1985 and 8-9-1986 against his supersession in promotion. The respondents have not cared to give any reply to any of his representations. In the meantime what the petitioner stated that he was promoted under the order dated 7th January, 1985 in the scale of Rs.550-900 as Assistant Headmaster. Shri A.P. Patel was promoted to the next higher post of Headmaster, Class-II services under the order dated 21st January, 1985 and the petitioner was not given the promotion. The petitioner made representation

claiming his promotions both on the post of Assistant Headmaster and Headmaster from the dates on which his junior Shri A.P. Patel was given promotions. These representations of the petitioner were also not attended.

4. The petitioner has been given promotion on the post of Headmaster, on which fact there is no dispute, on 29th March, 1985. In the seniority list of the persons serving in the pay scale of Rs.650-1200 (Class-II services) showing the position therein as on 1st August, 1985, the petitioner has been placed at serial no.40 and Shri A.P. Patel has been placed at serial no.37. The petitioner was left behind Shri A.P. Patel in the seniority list in both the cadres of Assistant Headmaster and Headmaster because of his late promotions in both these categories. Though objections have been filed by the petitioner but when nothing has been done, he approached to this court by this petition and prayer has been made therein for deemed date of promotion on the posts of Assistant Headmaster and Headmaster and all other consequential benefits flowing therefrom.

5. Reply to the special civil application has been filed by the respondent No.2 and therein justification has been given for supersession of the petitioner in promotion on the post of Assistant Headmaster on the ground that there were some adverse remarks in his Annual Appraisal Performance Report for the years 1979-80 to 1982-83. It is stated that "it is submitted that confidential reports of the petitioner for the years 1979-80 to 1982-83 were average and there are some adverse remarks during the said period." It has next been stated that in the annual confidential reports of the petitioner for the years 1984-85 and 1985-86 there were adverse remarks. However, it is admitted that on 15th November, 1984, the case of the petitioner was considered for promotion to the post of Assistant Headmaster and he was found suitable for promotion and accordingly on 7th January, 1985 he has been given the promotion. So far as the case of the petitioner for promotion to the post of Headmaster, Class-II services is concerned, it is admitted that his case was considered and accordingly on being found suitable, he was given promotion on 29th March, 1985.

6. Learned counsel for the petitioner submitted that the criteria for promotion to the post of Assistant Headmaster is only seniority. It has next been contended that there was no adversity in the service record of the petitioner on the day on which the case of the petitioner for promotion along with Shri A.P. Patel has been

consider, and the supersession of the petitioner in promotion is wholly arbitrary and unjustified. Shri Naik then contended that as a result of the delayed promotion in the category of Assistant Headmaster, consequence thereof is his late promotion in the category of Headmaster. If timely promotion would have been given to the petitioner in the category of Assistant Headmaster naturally as a consequence thereof he would have been promoted earlier in point of time to Shri A.P. Patel and there would not have been any pay anomaly. Lastly, it is contended that in the case of promotion of Headmaster whatever criteria may be taken but the petitioner has been promoted on 29th March, 1985 on which date in his Annual Appraisal Performance Report, adverse remarks were there for the year 1984-85 and it was not taken to be serious for denying promotion then how far it is justified for the respondents to make use of the so-called adverse remarks in the confidential reports of the petitioner for the years 1979-80 to 1982-83.

7. In contra, Ms. Manisha Lavkumar, learned A.G.P. contended that right of promotion is not a fundamental right but right of consideration for promotion is only a fundamental right, which right has not been denied to the petitioner. Admittedly, the case of the petitioner for promotion was considered and when he could not stand to merits in comparison to his junior, he has rightly been superseded. It is not a case where arbitrarily suppression has been made of the petitioner in the matter of promotion. When the adverse remarks were there in his confidential reports, he has rightly been superseded in promotion. In her submission, the petitioner has not challenged his supersession in the matter of promotion to the post of Assistant Headmaster within reasonable time and the person who superseded him has also not been impleaded as a party to this petition. In case what the petitioner contended is accepted by this Court, it will result in higher position of the petitioner in the seniority to that person and as a consequence thereof he will suffer in future service benefits and it can only be permissible after giving notice and an opportunity of hearing to that person.

8. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

9. During the course of arguments, Ms. Manisha Lavkumar, A.G.P. produced for the perusal of the Court, the Gujarat Educational Service Class-II (Administrative Branch) Rules, 1969. On being put by the court she has not shown whether these Rules regulate the recruitment

and other service conditions of the post of Headmaster or not. The respondents have not produced on the record of this special civil application when some of the adverse remarks in the Annual Appraisal Performance Report of the petitioner for the period 1979-80 to 1982-83 have been communicated to the petitioner. In reply, the respondent No.2 stated that the confidential reports of the petitioner for the years 1979-80 to 1982-83 were average. In the second breath, it has been sated that there were some adverse remarks for the said period. The petitioner has denied in the special civil application of receiving any adverse remarks during his service period except the adverse remarks which were communicated to him for the years 1984-85 and 1985-86. In view of these pleadings of the petitioner, the case as pleaded by the the respondent No.2 can only be accepted by this Court when documentary evidence is produced. A fact for proof of which, document is there then this primary evidence has to be produced by the respondents and when that has not been produced, for want of the same, it cannot be taken to be correct by the Court. As a result of this, the defence taken by the respondents that there are some adverse remarks during the period 1979-80 to 1982-83 in the confidential reports of the petitioner, cannot be accepted.

10. The criteria for promotion to the post of Assistant Headmaster is only seniority as per the case of the petitioner and so far as the respondents are concerned, they have not stated about the criteria. But it is difficult to accept that seniority is the only criteria for promotion to the post of Assistant Headmaster. This criteria may be of seniority-cum-merit. In the case of promotions which are to be made on the criteria of seniority-cum-merit unless there are positive demerits in the case of senior, he cannot be superseded. A senior with the average service record has a first and preferential claim for promotion on the promotional post for which criteria for promotion is seniority-cum-merit. Admittedly, the petitioner's confidential reports were average and his supersession which has been made in promotion on the post of Headmaster is wholly arbitrary and unjustified and it cannot be allowed to stand. The petitioner's case for promotion, in these facts, was not fairly and impartially considered and as a result of which, the matter needs to be reconsidered by the Departmental Promotion Committee for promotion to the post of Assistant Headmaster.

11. So far as promotion of the petitioner to the post of Headmaster is concerned, it is delayed for the reason

that he was not given promotion on the post of Assistant Headmaster along with Shri A.P. Patel. In case he would not have been superseded naturally he would have got higher seniority in the cadre of Assistant Headmaster and as a result of which, earlier promotion than Shri A.P. Patel in the cadre of Headmaster, Class-II services. The petitioner in the special civil application stated that the criteria for promotion to the post of Headmaster is seniority-cum-merit. By showing the Rules aforesaid, Ms. Manisha Lavkumar has tried to make out a case that it is not correct. Be that as it may. It is not relevant for the reasons that in case ultimately if the petitioner is found suitable for promotion to the post of Assistant Headmaster from the date on which his junior has been given promotion then naturally, the consequential effect thereof is to reconsider his case for promotion on the post of Headmaster and he may be given promotion appropriately i.e. earlier to Mr. Patel or from the same day on which he has been promoted if he is found suitable.

12. So far as the other contention raised by the counsel for the respondents regarding delay is concerned, it is suffice to say that this matter has been admitted and remained pending for all these years. Moreover, this court has found that the petitioner's supersession in the matter of promotion to the post of Headmaster is wholly arbitrary and unjustified, only on this ground if the petition is dismissed, it will result in causing grave injustice to the petitioner.

13. As regards the other ground that Mr. Patel has not been joined as a party and in case the claim of the petitioner is accepted he will be senior to him is also immaterial and irrelevant at this stage. Moreover, such objection from Shri Patel may be raised but not by the respondents. The petitioner is concerned only with his supersession in promotion. The petitioner has not challenged the order of promotion of Shri Patel on both the posts i.e. Assistant Headmaster and Headmaster. He is not against the promotion of Shri Patel. The matter is to be sent back to the Departmental Promotion Committee for reconsideration of the case of the petitioner for promotion and if the petitioner is found suitable for promotion then he will get all the consequential benefits for which Mr. Patel legitimately cannot have any grievance.

14. In the result, this special civil application succeeds and the same is allowed and it is hereby declared that the supersession of the petitioner in the

matter of promotion in the cadre of Assistant Headmaster is wholly arbitrary and unjustified. The respondent-State of Gujarat is directed to consider the case of the petitioner afresh for promotion with reference to the date on which, Shri A.P. Patel his junior has been promoted to the post of Assistant Headmaster by excluding the so-called alleged some adverse remarks in the confidential reports of the petitioner for the period from 1979-80 to 1982-83. On reconsideration, if the petitioner is found suitable for promotion he shall be entitled for all consequential benefits flowing therefrom. This exercise has to be undertaken and completed within a period of three months from the date of receipt of writ of this order. Rule is made absolute accordingly. The respondent-State of Gujarat is directed to pay Rs.3500/= as costs of this petition to the petitioner as what this amount has been charged by his counsel to provide his professional services to him in this case.

zgs/-